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Comment Summary and Responses

Comment Deadline: 23 April 2015

Amendment to the Water Quality Control Plan for the Sacramento River and San Joaquin River Basins for the Control of Diazinon and Chlorpyrifos Discharges

List of Commenters:

Comment Reference	Organization	Representative
1	East San Joaquin Water Quality Coalition Western Plant Health Association	Parry Klassen, ESJWQC Rachel Kubiak, WPHA
2	Westlands Water District	Phillip A. Williams

DRAFT

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Response to Comments:

No.	Author	Comment (when exact comments are used they are provided in italics)	Response
1.1	Parry Klassen & Rachel Kubiak	<i>The list of major dams in Table III-2B does not include Shasta Dam. Is this an oversight, or purposeful? If purposeful, why would Shasta Dam be excluded, which means that the Sacramento River upstream of Shasta Dam would be subject to the diazinon and chlorpyrifos water quality objectives.</i>	Shasta Dam was purposefully not included in Table III-2b because Keswick Dam is identified as the upstream reservoir on the Sacramento River. The diazinon and chlorpyrifos water quality objectives would <u>not</u> apply to the areas upstream of Keswick Dam including those areas upstream of Shasta Dam.
1.2	Parry Klassen & Rachel Kubiak	<i>Provision 6 contains the primary substantive requirements with respect to agricultural dischargers. As currently written, it is confusing with respect to what requirements apply, depending on the water body in question. Specifically, the requirement states that water bodies listed in Table III-2A that are not attaining the applicable water quality objectives for diazinon and chlorpyrifos are to submit management plans, and that the schedule for meeting objectives within the management plan shall not exceed five years from the effective date of the amendment. (Basin Plan Amendment, p. C-6.) The time schedule reference here conflicts directly with the time schedule provisions provided in provision 3, which allows for time schedules consistent with other existing law or policies, but no longer than 10 years from the effective date of this amendment.</i>	<p>The primary substantive requirements for agricultural dischargers are in a number of provisions in the Basin Plan Amendment, not just provision 6.</p> <p>Provision 3 sets the overall timeframe for reducing discharges to attain compliance with the water quality objectives for agricultural discharges at 10 years from the effective date of the amendment, since no existing law or policy directs the length of the compliance schedule.</p> <p>The adopted Basin Plan Amendment also has, in provision six, a ten-year timeframe for required management plans for dischargers that are not attaining the diazinon and/or chlorpyrifos. Therefore there is no inconsistency in the requirements.</p>

DRAFT

Comment Summary and Responses

Comment Deadline: 23 April 2015

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		<i>Accordingly, the time schedule reference in provision 6.b should be revised to be consistent with provision 3.</i>	
1.3	Parry Klassen & Rachel Kubiak	<p><i>Further, a later provision in provision 6 states that, if after the Executive Officer determines a water body listed in Table III-2A is exceeding an applicable objective, the Executive Officer shall require a management plan. This provision is inconsistent with the first paragraph of provision 6, which requires these same water bodies in Table III-2A to submit management plans. Was it the intent of the Central Valley Water Board for the provision in the first paragraph to apply to the specifically listed water bodies and the provision in the later paragraph to apply to those not specifically named (i.e., waters designated with WARM and/or COLD that are not upstream of the major dams in Table III-2B)?</i></p> <p><i>The language of the Basin Plan Amendment should be modified to clarify how the provision applies to the different categories of water bodies identified in Table III-2A.</i></p>	<p>The commenter is correct that the provision has two applications and is intended to apply 1) to 303(d) listed waterways not attaining water quality objectives as of the effective date of the amendment; and 2) waterways found to not meet objectives after the effective date of the amendment. In both cases management plans are required.</p> <p>In response to the commenter's question –the intent of the board is as stated above and is clearly stated in the provision.</p>
1.4	Parry Klassen & Rachel Kubiak	<i>Next, there is a renumbering error. After provision 6, appears provision 8. There is no provision 7.</i>	Basin Plan Amendment adopted by the Board in Resolution R5-2014-0041 does not have a missing provision #7. The Central Valley Water

DRAFT

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			<p>Board's website has been re-organized to more clearly direct viewers to the adopted Basin Plan amendment.</p>
1.5	Parry Klassen & Rachel Kubiak	<p><i>The Organizations continue to be concerned with the Agricultural Discharge Monitoring provision 4. (Basin Plan Amendment, p. C-9.) Specifically, it would require agricultural dischargers to “determine whether alternatives to diazinon and chlorpyrifos are being discharged at concentrations which have the potential to cause or contribute to exceedances of applicable water quality objectives.” In its response to comments on this requirement, the Central Valley Water Board replied, “this information requirement does not necessarily require monitoring if these alternatives pose no threat to water quality. The development of the monitoring and reporting programs must be designed to address all significant threats to water quality, be they diazinon and chlorpyrifos alternatives or not.” (Basin Plan Amendment, p. E-15.) This response seems to imply that any monitoring and reporting program for agricultural dischargers would require such monitoring anyway, thus including the same requirement here does not create an additional burden.</i></p> <p><i>We find this response, and the requirement itself, to miss the primary point that was being made by the Organizations. That is, waste discharge requirements for agricultural discharges address</i></p>	<p>While the primary focus of this Basin Plan Amendment was on diazinon and chlorpyrifos, the scoping documents for this Basin Plan Amendment process did not limit the scope to only the control of, or monitoring of diazinon and chlorpyrifos.</p> <p>Additionally, consideration of impacts of, and controls for alternative pesticides that dischargers may apply to avoid exceeding water quality objectives for diazinon and chlorpyrifos is a logical outgrowth of consideration of controls for diazinon and chlorpyrifos.</p> <p>The analysis supporting the Amendment also included analysis of monitoring that would potentially be needed to monitor for alternatives to diazinon and chlorpyrifos.</p> <p>Therefore the Agricultural Discharge Monitoring Provision 4 is within the scope of the project and supported by the analysis provided by the Central Valley Water Board.</p> <p>The determination of appropriate monitoring requirements for agricultural dischargers will occur at a later date as part of the Central Valley Water Board's regulatory programs' specific</p>

DRAFT

Comment Summary and Responses

Comment Deadline: 23 April 2015

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		<p><i>what is required monitoring for pesticides. The monitoring provisions in waste discharge requirements have a specified process for identifying appropriate pesticides for monitoring, including pesticides that are alternatives for chlorpyrifos and diazinon. The Basin Plan Amendment, however, applies to diazinon and chlorpyrifos. It is not a "general pesticide" Basin Plan Amendment, and thus should not include provisions beyond those that apply to the two pesticides specified. We continue to be concerned that the Central Valley Water Board uses pesticide specific Basin Plan Amendments to impose general pesticide requirements that are beyond the scope of the Basin Plan Amendment and the environmental review associated therewith. Accordingly, we request that this monitoring provision be deleted.</i></p>	<p>processes for identifying appropriate pesticides for monitoring.</p>
<p>2.1</p>	<p>Phillip A. Williams</p>	<p><i>The water quality objectives that the Central Valley Regional Control Board ("Regional Board") is proposing for diazinon and chlorpyrifos ("proposed Amendments") are based on the requirements of Section 303 of the Clean Water Act and the United States Environmental Protection Agency's ("EPA's") implementing regulations. Because they are derived from the federal Clean Water Act, the proposed water quality objectives can only be applied to "waters of the United States." See generally, Rapanos v. United States, 547 U.S. 715, 723-26 (2006). While the scope of</i></p>	<p>Although the proposed amendment does fulfill certain Clean Water Act section 303(d) requirements, the water quality objectives adopted by the Central Valley Water Board are adopted primarily pursuant to the Porter-Cologne Act. This California law imposes independent responsibility on the board to identify beneficial uses for waterbodies within the state, develop water quality objectives sufficient to protect those beneficial uses, and develop a plan of implementation to meet those water quality objectives. Unlike for board actions that rely <u>solely</u> on the federal Clean Water Act for</p>

DRAFT

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		<p><i>waters of the United States has been the subject of significant debate, the plurality in Rapanos demonstrates that agricultural and storm water drains are not waters of the United States. Indeed, the Court expressly criticized two Ninth Circuit cases - Community Ass 'n for Restoration of Environment v. Henry Bosma Dairy, 305 F.3d 943 (9th Cir. 2002) and Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526 (9th Cir. 2001)-for concluding that "irrigation ditches and drains that intermittently connect to covered waters " were jurisdictional. Rapanos, 547 U.S. at 727. The plurality went on to explain that "[i]n applying the definition to ... storm sewers and culverts ... drain tiles, [and] man-made drainage ditches ... the Corps has stretched the term 'waters of the United States' beyond parody." !d. at 734. In light of this precedent, it would be unlawful for the State Board to approve the proposed Amendments that would apply the Section 303 water quality objectives to irrigation and storm water drains that are not waters of the United States.</i></p>	<p>authority, the board's scope of authority under Porter-Cologne is not limited to waters of the United States. Therefore, the limitations imposed or implied by the <i>Rapanos</i> decision are inapplicable here.</p>
2.2	Phillip A. Williams	<p><i>The proposed Amendments, however, leave open the possibility that the water quality objectives would be applied to agricultural and storm water drains. In developing the proposed Amendments the Regional Board</i></p>	<p>The Board acknowledged that the water quality objectives in the amendment would apply to some waterbodies that could be defined as agricultural and/or storm water drains if the board determines that WARM and/or COLD beneficial uses are</p>

DRAFT

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		<p><i>staff evaluated which water bodies should be subject to the proposed water quality objectives and presented the Regional Board with four alternative approaches. Based on the staff's recommendation, the Regional Board adopted applicability criteria that would apply the objectives to a specified list of water bodies, as well as "[w]aters with designated or existing WARM and/or COLD beneficial uses 1" Proposed Basin Plan Amendment at C-2. While the proposed Amendments do not specifically list agricultural and storm water drains, the Regional Board's staff report expressly relies on data from these conveyances in developing the proposed water quality objectives. For example, the report separately evaluates water samples from agricultural and urban storm drains and compares them to currently applicable water quality criteria for diazinon and chlorpyrifos developed by the California Department of Fish and Game. Staff Report at 51, T.I-10. Thus, it is clear that concentrations of diazinon and chlorpyrifos in these conveyances played an important role in the development of the proposed water quality objectives</i></p>	<p>applicable. The amendment allows the Central Valle Water Board flexibility to determine situations where these beneficial uses would apply.</p> <p>Table 1-10 in the Staff Report was both a characterization of sources (such as minor agricultural and storm water drains) and a characterization of waterbodies for which the objectives would likely apply. The concentrations in minor constructed agricultural and urban drains was for the purposes of a characterization of these sources of discharge for the Board, and does not convey the intent to apply the objectives in minor constructed drains.</p>
2.3	Phillip A. Williams	<p><i>In view of the Regional Board's reliance on data from these conveyances in crafting the proposed</i></p>	<p>See response to comment 2.1 and 2.2</p>

DRAFT

Comment Summary and Responses

Comment Deadline: 23 April 2015

Amendment to the Water Quality Control Plan for the Sacramento River and San Joaquin River Basins for the Control of Diazinon and Chlorpyrifos Discharges

		<p><i>Amendments, Westlands remains concerned the Regional Board may seek to apply the proposed water quality objectives to agricultural and storm water drains by designating WARM or COLD beneficial uses for the drains. In fact, the staff report touts the flexibility to do so as a key benefit of its preferred alternative. See Staff Report at 88 ("This alternative would leave the Board flexibility in terms of appropriate benefits use designations and water quality objectives in constructed water bodies such as drains and canals")(emphasis added); see also id. at 86 ("This alternative ... would leave more flexibility for smaller constructed water bodies, because WARM or COLD beneficial uses may not apply to some tributaries that are considered 'constructed.")(emphasis added). Further, after receiving comments on the 2013 proposal that argued that agricultural and storm water drains were not waters of the United States under the Clean Water Act, the Regional Board asserted that the distinction was not "clear cut" and suggested that at least some of those conveyances could be deemed waters of the United States and assigned beneficial uses at a later date.</i></p> <p><i>In short, if approved, the proposed Amendments will create significant uncertainty for entities that use and manage agricultural and storm water drains. Rather than leaving open the possibility that the Regional Board may seek to subject</i></p>	<p>The future designation of beneficial uses for waters without currently designated beneficial uses would be a separate regulatory process that would require the consideration of the applicable objectives and due public process at the time that designation is made. The future determinations are beyond the scope of this Amendment.</p> <p>Additionally, as discussed in the Staff Report, the Central Valley Water Board has initiated a stakeholder process for the consideration of beneficial uses in agriculturally dominated waters, in which potential impacts to users of agricultural drainage facilities will be a primary consideration. The Board acknowledges there is some uncertainty as to where the objectives would apply, but this is appropriate as it allows flexibility for appropriate application of the objectives in the future.</p> <p>Finally, uncertainty regarding the scope of the term "waters of the United States" stems from ambiguity under federal law, not ambiguity in this Amendment. In any case, such ambiguity is irrelevant to this Amendment for the reasons discussed in response to comment 2.1.</p>
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DRAFT

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		<p><i>these conveyances to the water quality objectives at some undisclosed, later date, we urge the State Board to clarify that the proposed Amendments will not and cannot be applied to agricultural and storm water drains that are not waters of the United States under the Clean Water Act.</i></p>	
2.4	Phillip A. Williams	<p><i>The proposed Amendments include adoption of water quality objectives for diazinon and/or chlorpyrifos. Adoption of such objectives must comply with certain provisions of the Water Code, and are specifically required to comply with Water Code section 13241. Section 13241 requires the regional boards to consider a number of statutorily specified factors prior to adopting water quality objectives that will "reasonably" protect beneficial uses. Among these required factors, subdivision (d) requires the regional boards to consider "economic considerations" as a factor under section 13241.</i></p> <p><i>Although the Draft Staff Report includes tables and some narrative with respect to the factors specified in Section 13241, the analyses in the tables and the narrative associated with each factor is limited at best. For example, with respect to economic considerations, the tables in the Draft Staff Report claim that for application of the CDFG/USEPA criteria and UC Davis criteria,</i></p>	<p>The analysis provided in the Staff report contains an extensive analysis of the potential costs of attaining the proposed objectives, and these economic considerations were provided and considered by the Central Valley Water Board in their adoption of the amendment.</p> <p>The estimate of the potential increase in the cost of production provided a general magnitude of the costs of the practices that could be implemented to attain the proposed objectives. However, as described in the Staff Report, similar costs would likely be incurred even if the Board made no changes to the water quality objectives, because growers would still need to meet the applicable narrative objectives since the criteria being considered for the new numeric objectives are currently used to interpret the narrative objectives. Additionally these costs were not expected to be needed by all growers since many growers are already, or will in the near future be, implementing a number of these practices for a number of reasons not limited to compliance with the objectives.</p>

DRAFT

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		<p><i>the economic considerations are modest or have no negative impact. The narrative refers to section 9 but makes little attempt to actually quantify the cost except to say that costs could increase total production costs for agriculture by 1-9%. (Draft Staff Report, p. 113.) The narrative does not discuss what type of impact a 1-9% increase in production costs may have on agriculture.</i></p> <p><i>The reality is that, for agriculture, increases in production costs of 1-9% can be significant. Such increases can mean the difference between a positive profit year or a negative one. Accordingly, the costs associated with meeting the water quality objectives in the Draft Amendment can be significant and should be more clearly discussed in the Draft Staff Report.</i></p> <p><i>Water Code section 13245 provides that the State Water Board may "return [a Regional Board's water quality control plan] to the regional board for further consideration and resubmission to the state board." (Water Code, section 13245.) Given the lack of due consideration given to the economic impacts, as specifically required under Water Code section 13241, subd. (d), Westlands respectfully requests that the State Water Board return the Amendment to the regional</i></p>	<p>Further, the costs estimates in the staff report were likely high-end estimates that were not reduced to account for other benefits of many of the applicable practices, such as reduced water use and erosion and reduced discharges of other pollutants that were not readily quantifiable in the cost estimates.</p> <p>Finally, the potential impacts of these costs are within the scope of the impacts already considered by the Board in the environmental analysis of the Long term Irrigated Lands Regulatory Program, with which the Amendment is consistent.</p>
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DRAFT

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Comment Deadline: 23 April 2015

Amendment to the Water Quality Control Plan for the Sacramento River and San Joaquin River Basins for the Control of Diazinon and Chlorpyrifos Discharges

		<i>board for adequate consideration of all the factors required to be considered under the Water Code.</i>	
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